No. 15736

In the United States Court of Appeals for the Ninth Circuit

HERRING MAGIC, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Western District of Washington Northern Division

HONORABLE JOHN C. BOWEN
United States District Judge

Brief for the Appellant

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Brief for the Appellant

Numerals in parentheses refer to pages of the transcript of record unless otherwise stated.

JURISDICTION

Appellant's complaint seeks recovery of manufacturer's excise taxes assessed and collected from it under §4161 of the Internal Revenue Code of 1954 which imposes a tax on sporting goods. (3-12) Appellee's answer denies appellant's right of recovery. (12-14) The judgment dismissing appellant's complaint was entered September 6, 1957. (20-21) The notice of appeal was filed September 16, 1957. (21) The jurisdiction of this court rests upon 28 U.S.C. 1291.

THE QUESTION PRESENTED

A device is made of colorless, translucent plastic. It is designed to hold the head of a baiting minnow and to obtain reaction upon its curved surfaces from the

water through which it moves when trolled. When so used the baiting minnow will wriggle and swim. The device cannot be used without a baiting minnow.

Is such a device, in itself, an "artificial lure" within the purview of §4161 of the Internal Revenue Code of 1954?* (hereafter referred to as "§4161").

Appellant's answer is that the device is not an "artificial lure" within the meaning of the statute.

STATEMENT OF THE CASE

On August 9, 1944, Myron Miller applied for a patent on a device hereafter referred to as "Herring Magic" designed for use in fishing. The application was granted on February 15, 1949, as United States Patent No. 2461744. (73)

Appellant was incorporated in Washington on April 16, 1954. Myron C. Miller was then and is now appellant's majority stockholder. (73) Subsequent to appellant's incorporation, he assigned to it his Herring Magic patent. (32)

Appellant commenced manufacturing Herring Magic on or about January 1, 1955, and selling them on or about March 7, 1955. (73-74) On June 8, 1955, the District Director of Internal Revenue for the District of Washington notified appellant that an excise tax was applicable to the sale of Herring Magic under the provisions of §4161. (74)

*Set out in full in Appendix A.

Appellant filed the required tax returns and paid the following taxes on the dates indicated:

September 12, 1955	$ 567.72
November 8, 1955	1,738.08
January 20, 1956	17.55
Total	$2,323.35 (74)

Within the time required by law appellant filed a claim for refund. (74-75) The claim was rejected in full. (75) This action followed.

At the trial below, it was stipulated, among other things, that the "only issue in this cause is whether plaintiff's (appellant's) device (the Herring Magic) is an 'artificial lure' within the purview of §4161 of the Internal Revenue Code of 1954." (75)

Herring Magic is made of colorless, translucent plastic and has a deep, concave cavity or headstall on one end and a "scoop shaped" face on the other. (Ex. 1)** In use, the head of a minnow is placed in the cavity and fastened to it by means of a pin inserted through the minnow's head. Suitable hooks are attached to the underside of the minnow. (Ex. 2) The fisherman's line (with leader) is secured to a metal eye in the scoop-face. (Ex. 4)

When thus assembled and trolled through the water, the reaction of the water on the Herring Magic and

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**Appellant's (plaintiff's) exhibits are numbered 1 through 13 inclusive. Appellee's (defendant's) exhibits are numbered A-1 through A-5 inclusive. See Appendix B.

minnow's body causes the minnow to wriggle and simulate live swimming movements. (50, 99, 100) Game fish are attracted to the minnow by its life-like action, as well as by its natural shape and scent. (57-58)

In use, Herring Magic is practically invisible so that the game fish see only the minnow moving through the water. (28, Ex. 13) Herring Magic, by itself, has no scent, does not resemble any natural food of game fish and has no color or other attractive features. (Ex. 1) *When used alone Herring Magic tumbles erratically, has no balance, and twists the leader up so that it cannot be utilized in fishing.* (51)

In the Herring Magic patent the words "lure" and "fish lure" were used. (Ex. 3) In the advertising used by appellant the word "lure" has been used. (Exs. 4, 5, 6, 7, A-5) Sometimes the terms refer to Herring Magic and sometimes to the device when attached to a minnow. The term "actionizer" is also used in the advertising material, but always to refer to Herring Magic. (Exs. 4, 5, 6, 7, A-5) Sport fishermen use either the word "lure" or "actionizer" to refer to Herring Magic, or use its full name to describe it. (Ex. A-5) The District Director describes Herring Magic as a ". . . bait holder . . . an article for holding fish used as bait . . ." (Ex. 9)

SPECIFICATIONS OF ERROR

1. The District Court erred in finding as a matter of fact and concluding as a matter of law that appel-

lant's device is an "artificial lure" within the purview of §4161. (11, 12)

2. The District Court erred in granting judgment for appellee. (20, 21)

These specifications of error will be argued together.

SUMMARY OF THE ARGUMENT

This appeal involves the construction of general language found in a tax statute. Neither the statute, §4161, nor any regulation defines exactly what is meant by "artificial lure." Appellant asserts that to be an "artificial lure" a device must, in itself, be imitative of some natural form of fish food or at least have some luring qualities found in natural food. Herring Magic is not such a device. It is a device that will hold the head of a baiting minnow and, when trolled, act as a hydrafoil—designed to obtain reaction upon its surface from the water through which it moves.

In appellant's advertising and in the Herring Magic patent, the use of the words "lure" and "fish lure" is ambiguous at best. Other terms have been used by appellant and various persons that accurately describe the device. In any event, the determination of whether or not the Herring Magic device falls within §4161 is a matter of law and all these terms are of little, if any, help. It is a bait holder.

ARGUMENT

Section 4161 of the Internal Revenue Code of 1954 provides:

> "There is hereby imposed upon the sale by the manufacturer . . . of the following articles . . . a tax equivalent to 10 per cent of the price for which so sold:
>
> . . .
>
> "Fishing rods, creels, reels and artificial lures, baits and flies . . ."

One source for the meaning of the general language "artificial lures" is the dictionary. Webster's New International Dictionary, Second Edition (unabridged) defines the adjective "artificial" as follows:

> "1. a. Made or contrived by art; produced or modified by human skill and labor, often as an imitation of something found in nature;—opposed to *natural;* as *artificial* heat or light, gems, salts, minerals, fountains, flowers, breeding . . .
>
> "b. Made, esp. by a chemical process to resemble a raw material, or something derived from it; synthetic; as, *artificial* cotton or wool.
>
> "2. Feigned; fictitious; assumed; not genuine. . . ."

The noun "lure" is defined:

> "1. A contrivance somewhat resembling a bird, made of a bunch of feathers attached to a long cord, and often baited with raw meat,—used by falconers in recalling hawks.
>
> "2. That which invites by the prospect of advantage or pleasure; an allurement; enticement.
>
> "3. A decoy or bait for fish or animals; specif. a tassellike structure on the head of pediculate fishes . . ."

Webster does not define the combination of words

"artificial lure," but does provide a definition for "artificial fly."

> "Artificial fly. *Angling.* A lure, used in fly casting, consisting of feathers, silk, wool, tinsel, etc., fastened to a fishhook by a silk-thread winding, generally in imitation of any of various flies, moths, caterpillars, etc."

It would seem that the first meaning of "artificial" and the third of "lure" are applicable. Thus, an "artificial lure" is a thing which is itself (1) imitative of some natural form of food eaten by game fish and (2) attractive to fish. The object itself, the lure, must be an imitation of something, otherwise the modifier, "artificial," would have no meaning.

The court did not find that Herring Magic, by itself, is either imitative of some natural form of food or attractive to fish. Rather, the court found that bait (the minnow) when used with a Herring Magic will lure fish. (15) With this appellant does not quarrel. But to conclude from such finding that Herring Magic itself is an artificial lure is a *non sequiter.*

A dead minnow has natural scent and is natural food for game fish. One may fasten a minnow to a line, without a rod, and drop it into the water *while standing on dock or rock.* The minnow hangs suspended in the water, its scent, filtering through the water, and its shape both act to lure passing game fish.

To improve on this, one uses a boat and trolls through the water. Now the minnow, being towed by its head,

appears to be moving through the water and the luring qualities of its scent and shape are more effectively utilized.

As a refinement lead weights (sinkers) and a modern fishing rod are added. With this, casting is facilitated, and the depth of the minnow regulated.

Each addition subsequent to the rodless cast from dock or rock serves to accentuate the luring qualities of the baiting minnow and employ them more effectively. Each step makes the bait better bait. Yet none would argue the boat, weights, or rod were artificial lures.

The Use of the Term "Lure" and "Fish Lure"

Great stress was laid by appellee on appellant's use of the word "lure" in its advertising and on Myron C. Miller's use of the words "fish lure" in his patent. An examination of the exhibits will demonstrate the ambiguous use of the term.

Exhibit 4 is a small flyer inserted in the Herring Magic box. On one side there is an imaginary letter from a Herring Magic to the fisherman. In the first paragraph the Herring Magic says, "I am the new 'hot lure' . . . " But in the fifth paragraph it says, ". . . to feeding fish I'm the 'real McCoy' and must act exactly like the rest of the live minnows they eat every day . . ." Obviously the "I" in both paragraphs means the Herring Magic *and* the minnow. Below the letter the slogan "Naturally lures more fish, it's the real

thing" is shown over a sketch of Herring Magic attached to a minnow. The "real thing" is the minnow.

Exhibit 6 is a jobber sheet. At one place it reads "The only lure that gives fresh or frozen minnows the same . . . action of . . . live . . . minnows." At another place it reads ". . . (Herring Magic) consistently outfishes other top-rated lures because: it looks exactly like a . . . minnow . . ." Again an ambiguity, Herring Magic may give minnows action but *it* doesn't look like one.

Exhibit 7 is a wholesaler type of advertising and has a place for the dealer to insert his own name or imprint. Exhibit 5, a counter display card, is a partial reproduction of Exhibit 7. Each reads " . . . Unlike other lures intended to resemble minnows, Herring Magic's . . . actionizer . . . activates dead fish that anglers . . . often mistake it for a live minnow . . ." Herring Magic doesn't resemble a minnow, so *it* couldn't be mistaken for one. Here the word "lures" refers to the dead minnow when activated.

In Exhibit 3, the patent application, the inventor called his invention a "fish lure." Yet, in referring to the use of a lure, he said:

> ". . . In every instance the lure is intended to be drawn through the water and to have imparted to its motion actions resembling the natural swimming or darting action of the lesser fishes . . ." Ex. 3, Col. 1, line 15.

The "lure's" motions must refer to the motions of

the minnow if *it* is to resemble live bait. In the claims of the patent the invention is not referred to as a fish lure but always as a "trolling device."

The inventor has coined the term "actionizer" to describe Herring Magic. (37) So in Exhibit 6, on the sketch of the box appears "The Frantic Swimming Actionizer." Exhibit 7 states ". . . This Truly Revolutionary Actionizer Has Become the Favorite . . ."

Exhibit A-5, an advertising brochure, contains 21 letter testimonials. Of these 15 refer to the device as "Herring Magic," 3 as an actionizer and only 3 as a "lure."

To Be Taxable, a Device Must Be an Artificial Lure, *Per Se*

Where legislative bodies have enacted statutes concerning "artificial" objects, the courts have consistently held that to be within the statute, the object must be an imitation of the natural thing it represents.

In *California Casualty Indemnity Exchange* v. *Industrial Accident Commission of California*, 90 P.(2d) 289, 13 Cal.(2d) 529, the issue was whether eyeglasses were "artificial members" within the meaning of the California Workmen's Compensation Act which authorized compensation for "injuries to artificial members." The court stated the test to be—was the thing injured a substitute for, or a mere aid to some natural part of the body, and held:

"An artificial member must be held to be a

substitute for a natural part, organ, limb or other separable part of the body . . ." (at 90 P.(2d) 289, 13 Cal. (2d) 529)

Eyeglasses would make the eyes (a member) function more efficiently. Yet they are not "artificial members." Herring Magic will make the minnow (the lure) function more efficiently. It is not an artificial lure.

The test should be—is the device a substitute for (imitative of) natural bait, or is it a mere aid to the use of bait?

Morimura Bros. v. *United States*, 8 Ct. Cust. App. 111, involved the dutiable classification of objects resembling pears and apples under a statute imposing a duty on "artificial and ornamental fruits." It was urged that the proposed use of the articles (as pincushions) and not their *per se* character controlled their classifications. The court held the *per se* character was determinative, stating:

> "In the (statute) the words 'artificial' and 'ornamental' are used conjunctively, modifying and qualifying among others the word 'fruits.' Inferentially, if not presumptively, these qualifying words were used by the legislature in the same limiting sense. It will not be questioned that 'artificial' relates to and qualifies the word 'fruits,' and was therefore used in a per se sense and not as indicating use. Any other view would be plainly inapt. Inferentially, if not presumptively, then, the conjoint word of qualification, 'ornamental,' was so used and refers to the per se character and

> not the intended use of the fruit." (at 8 Ct. Cust. App. 113)

In *United States* v. *Dieckerhoff*, 4 Ct. Cust. App. 384, it was held that if the object is not a "substantial simulation of the natural fruit," it is not "artificial fruit" within the meaning of a statute imposing a duty on "artificial or ornamental fruits." The court quoted from a similar case as follows:

> " 'In order to be artificial fruit such articles should simulate the natural in form, color and outline to such an extent that they might readily be taken for the fruit they represent.' " (at 4 Ct. Cust. App. 386)

Accord: *United States* v. *Kresge Co.*, 12 Ct. Cust. App. 34.

An examination of §4161 shows that Congress has taxed very specific articles of sports equipment. No general classifications are described. In the case of rackets, racket frames, billiard and pool tables, golf bags, balls, clubs and sleds Congress has even stipulated a minimum length for the article before it is to be taxed!

The 1932 version of the statute taxed "games" and ended with the phrase ". . . and all similar articles commonly or commercially known as sporting goods." §609, Revenue Act of 1932, 47 Stat. 264. The 1941 version taxed "fencing equipment" and "gymnasium equipment and apparatus." §3406 (a) (1), Internal Revenue Code of 1939, 55 Stat. 716. Congress has elim-

inated the use of catch-all words such as "games," "sporting goods," "equipment" and "apparatus." It is difficult to believe that Congress intended the names of the taxable articles to be construed in any other but a *per se* sense.

The District Director, after consideration of the use and nature of Herring Magic, gave it the plain name "bait holder." (Ex. 9) Not a very grand term from the advertiser's viewpoint, but quite appropriate. His definition of what it is ". . . an article for holding fish used as bait . . ." is as satisfactory as any. (Ex. 9)

Mr. Korff, appellee's witness, testified that all the articles on Exhibits A-1, A-2, A-3 and A-4 were artificial fishing lures. (80) It is obvious on examination that all the articles on these exhibits, with the exception of the Herring Magic device (Ex. A-1, No. 3, row 3) and the "strip rig" (Ex. A-1, No. 4, row 3), have color and will produce some attractive motion when used by themselves. (Even the strip rig can be used by itself, to some degree. (91)) What he failed to realize is that the Herring Magic device is a departure from traditional methods of fishing. Designed to be invisible in use, its purpose is to create a reaction from the flow of water over its surfaces and cause a baiting minnow to appear alive. When so used all the luring qualities of the baiting minnow are enhanced and, it is hoped, productive of a good catch.

Tax Classifications Are Strictly Construed

It is fundamental that tax statutes are strictly construed and that doubts are resolved in favor of the taxpayer.

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the government, and in favor of the citizen."
>
> *Gould* v. *Gould,* 245 U.S. 151, 153, 62 L. Ed. 211, 213.

In *White* v. *Aronson,* 302 U.S. 16, 82 L. Ed. 20, the 1932 version of the statute here involved was under consideration. That statute imposed a tax on ". . . games and parts of games . . ." The government contended that jig saw puzzles were within the statute, and maintained that the effort to arrange the pieces was for amusement and thus amounted to a game. The Supreme Court declined to hold that every instrumentality whose chief use was to afford amusement was a game, and held for the taxpayer, stating:

> "When there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer. . . . Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them . . ." (at 302 U.S. 16, 20, 82 L. Ed. 20, 23)

By judicial construction the District Court has enlarged the statutory term "artificial lure" to mean "fishing tackle."

CONCLUSION

The plain meaning of the term "artificial lure" within the purview of §4161 is an article which in itself is imitative of some natural form of game fish food and is attractive to fish. Herring Magic is a device which will enhance the luring qualities of a natural form of game fish food—a baiting minnow. The device is not an artificial lure.

Respectfully submitted,

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APPENDIX A

Section 4161 of the Internal Revenue Code of 1954, 68A Stat. 489, 26 U.S.C.A. 4161

SPORTING GOODS

Sec. 4161. IMPOSITION OF TAX

There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof) a tax equivalent to 10 per cent of the price for which so sold:

Badminton nets, rackets and racket frames (measuring 22 inches over-all or more in length), racket string, shuttlecocks and standards.

Billiard and pool tables (measuring 45 inches over-all or more in length) and balls and cues for such tables.

Bowling balls and pins.

Clay pigeons and traps for throwing clay pigeons.

Cricket balls and bats.

Croquet balls and mallets.

Curling stones.

Deck tennis rings, nets and posts.

Fishing rods, creels, reels and artificial lures, baits and flies.

Golf bags (measuring 26 inches or more in length) balls and clubs (measuring 30 inches or more in length).

Lacrosse balls and sticks.

Polo balls and mallets.

Skis, ski poles, snowshoes and snow toboggans and sleds (measuring more than 60 inches over-all in length).

Squash balls, rackets and racket frames (measuring 22 inches over-all or more in length) and racket string.

Table tennis tables, balls, nets and paddles.

Tennis balls, nets, rackets and racket frames (measuring 22 inches over-all or more in length) and racket string.

APPENDIX B—EXHIBITS

Appellant's Exhibits Nos.	*Identified At Record Page*	*Offered & Received At Record Page*
1	28	30
2	29	30
3	31	32-33
4	33	34
5	38	38
6	38	39
7	41	43
8	42	43
9	42	43
10	43	43
11	43	43
12	47	48
13	46	48

Appellee's Exhibits Nos.		
A-1	80	80
A-2	80	80
A-3	79	80
A-4	80	80
A-5	96	97